

96CV05465-

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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PASQUALE ROMANO,

96 CV 5465

Plaintiff,

MEMORANDUM

AND

ORDER

- against -

KENNETH S. APFEL,
Commissioner of Social Security,

Defendant.

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CAROLYN A. KUBITSCHKE, ESQ.
LANSNER & KUBITSCHKE
325 Broadway, Suite 201
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for plaintiff

ZACHARY W. CARTER
United States Attorney
Eastern District of New York
(Linda M. Marino, of counsel)
One Pierrepont Plaza, 14th Floor
Brooklyn, New York 11201
for respondent

NICKERSON, District Judge:

Plaintiff brought this action under 42 U.S.C. § 405(g) to review the determination of the Commissioner of the Social Security Administration finding that plaintiff was not disabled. The complaint seeks reversal of that determination or in the alternative a remand of the matter for a new administrative hearing, the same relief plaintiff's counsel asked of the Appeals Council.

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Plaintiff applied for disability insurance benefits and supplemental security income benefits on November 3, 1994, alleging he has been disabled since January 1, 1994, due to hypertension, dizziness, arthritis, and a hernia. An Administrative Law Judge held a hearing on August 29, 1995, and rendered a decision on December 1, 1995, finding that plaintiff was not disabled. The Appeals Council denied review on October 25, 1996. This action followed.

The Administrative Law Judge made the following formal findings. Plaintiff met the disability insured status requirements on January 1, 1994, and continued to meet them through December 1, 1995. He has not engaged in substantial gainful activity since January 1, 1994. The medical evidence shows that he suffers from arthritis and hypertension, severe conditions, but that he does not have a listed impairment. Plaintiff's allegations of the severity of his impairments are not credible and not supported by the objective medical evidence. He has the residual functional capacity to perform his past relevant work as a chef because that work did not require any lifting and carrying of objects weighing more than fifteen pounds.

The Commissioner has moved for an order reversing that decision and remanding the case for a further proceeding pursuant to 42 U.S.C. § 405(g). The

Commissioner says that the decision may be deficient due to legal error. The grounds for the Commissioner's motion are that the Administrative Law Judge did not adequately develop the record, did not adequately question plaintiff about his claims and treatment, may not have obtained a knowing waiver of the right to have counsel at the administrative hearing, did not ask plaintiff about the demands of his past relevant work, and did not provide an analysis or rationale for the finding that plaintiff could perform that work.

Plaintiff's counsel agrees that the Administrative Law Judge did not fulfill his responsibilities, but opposes the motion to remand and asks the court to reverse the Commissioner's decision and award benefits.

The record does not justify a conclusion that plaintiff is entitled to benefits. The opinion of the treating physician, Dr. Franz Chille, consists of his entries on a printed form of the New York State Department of Social Services. The only clinical findings entered on the form are decrease in bending, contraction of right hand, and no neuro deficit. While entries on the form state that plaintiff can stand or walk for up to two hours a day and sit for less than six hours a day, there is no narrative analysis of the rationale for those entries.

The report of Dr. Lee Mescon, the consulting physician on behalf of the government, is a full, detailed report of what the doctor found and what the plaintiff told him. The doctor concluded that based on the history and his physical findings suggestive of arthritis of the left knee plaintiff's ability to sit and stand would not be compromised, but plaintiff's ability to climb, push, pull, or carry heavy objects will probably be limited because of left knee pain. The doctor's prognosis for the back and knee pain was "probably guarded, but could be remarkably improved with analgesic medications" and the prognosis for the hypertension was "excellent."

Plaintiff's counsel said there was a failure of communication between this doctor and plaintiff. The doctor noted that plaintiff was "coherent, cooperative, oriented to person, place, and time." He reported that plaintiff said that he could sit intermittently for eight hours and stand for two hours and spent his time taking walks and visiting friends. It seems unlikely that the doctor would have arbitrarily made up the many details set forth in the report. This court cannot assume the report is worthless.

Plaintiff's attorney also claims that if the court remands for a new hearing plaintiff has essentially won a declaration that the Social Security Administration

erred in denying the plaintiff benefits and asks that the court award interim benefits. This court's remand does not prejudge the question of whether or not plaintiff is disabled. Plaintiff's attorney says that such relief is in any event proper because of the delay in the disposition of the case. Interim benefits might be appropriate were there more significant evidence of disability, but are not appropriate here.

The case is remanded for further administrative hearing.

So ordered.

Dated: Brooklyn, New York
October 20, 1998


Eugene H. Nickerson, U.S.D.J.